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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. DANIEL RAY COFFMAN, Defendant and Appellant.	2d Crim. No. B186332 (Super. Ct. No. 2003014877) (Ventura County)

Daniel R. Coffman was sentenced to three years state prison after a jury convicted him of grand theft (Pen. Code, § 487, subd. (a))[1], two counts of money laundering (§ 186.10, subd. (a)), and false advertising in violation of Business and Profession Code section 17500, a misdemeanor. He appeals, arguing among other things, that the trial court erred in not severing the count for false advertising and in not granting probation. We affirm.

Facts

In September 2000, appellant gave a seminar at Margie Pitchford's house where he met Pitchford's niece, Claudette Siah. Appellant said he was president of BioLink which sold a herbal drink called Leinad ("Daniel" spelled backwards). Leinad

[1] All statutory references are to the Penal Code unless otherwise stated.

was made with herbs, vodka, and water Appellant said the herbal drink could treat any ailment including lupus.

Siah had just been laid off from a 20 year secretarial job and had a $47,674 retirement savings check. She had to reinvest the money in 60 days or pay tax penalties.

Appellant said that he was an Arizona attorney, that he knew about real estate and stock, and that he would help her. Siah and Pitchford trusted appellant because he was a friend of the family.

On December 27, 2000, appellant took Siah and Pitchford to a Charles Schwab office in Westwood to put the retirement savings in an investment account. The account representative declined to open an account because appellant did not have a BioLink business letterhead.

Appellant told Siah that she could put the retirement savings in a BioLink bank account at the Bank of America in Westlake Village. Appellant knew a bank employee and his sister-in-law and brother were long time bank customers. Appellant assured Siah that she could trust him and that he would not do anything to hurt her. Siah gave Pitchford $5,000 to invest in the BioLink account and agreed to deposit the balance of her retirement savings ($42,674) in the same account.

On December 30, 2000, appellant drove Siah to the Bank of America in Westlake Village where they opened an account under the name "Daniel R. Coffman d/b/a Biolink Information Systems." Siah deposited the $47,674 retirement check and the bank put a hold on it.

On January 17, 2001, appellant transferred $5,000 from the BioLink account to his personal account. Appellant told Siah and Pitchford that he had invested their money in stocks and gave them Yahoo internet print outs of stocks with handwritten notations.

In April 2001, Siah asked for $800 to fix her car. Appellant said that she would lose her entire investment if any money was withdrawn from the account. A few days later, appellant wrote an $8,000 BioLink check to himself and deposited it in his personal account.

By June 16, 2001, appellant withdrew all but $83 from the BioLink account. Appellant spent the money on debit card purchases, restaurants, clothes, rental cars, gyms, a lavish birthday party for himself, and made a $1,000 wire transfer to his ex-girlfriend.

Siah called appellant about the bank withdrawals but got no answer. On September 11, 2001, appellant called back and said that all the money had been lost that day in World Trade Center terrorist attack. On September 24, 2001, he took Siah's name off the bank account signature card.

After Siah and Pitchford reported the theft, investigators obtained a search warrant and examined the bank records.

On April 28, 2003, Laurie Coffman, appellant's sister-in-law, saw appellant's photo on a flyer at a health food store in Thousand Oaks. The flyer stated that "Daniel Coffman N.D., Ph.D., M.Sc." would speak at the Renaissance Hotel in Agoura Hills about a "Breakthrough Discovery: What is the Underlying Cause of Body Problems?" Laurie Coffman was shocked because appellant had barely finished high school. She sent a copy of the flier to the detective investigating the case.

Michael Fino, an investigator for the Ventura County District Attorney attended the Renaissance Hotel presentation. The hotel placard listed appellant as the guest speaker and stated that he had several degrees including a Ph.D. About 30 people attended the seminar. Appellant was introduced as Dr. Daniel Coffman, president of Bio Link International.

Appellant told the audience that he was selling liquid and tablet supplements including "super greens" and "pH prime" to treat over-acidation of the body, a medical condition that was the cause of all diseases. Appellant took a blood sample from a volunteer in the audience (Karen), projected a slide of the blood sample on a screen, and said that Karen had acid crystals in her blood. Members of the audience were invited to make an appointment so that appellant could take their medical history, analyze their blood, and determine their medical needs.

On May 14, 2003, detectives searched a Moorpark house where appellant lived. One of the bedrooms was converted into an office. Officers found an October 1, 2002 loan application which stated that appellant was the owner of "BioLink Info Sys," that he had owned the company for five years, and that he earned $75,000 a year. The police found binders of Yahoo stock printouts similar to the documents appellant gave Siah and Pitchford. The police also found seminar flyers and documents listing appellant's professional degrees and qualifications. There were job resumes, but none of the resumes said that appellant was an attorney, a doctor, or had a PH.D. or MSC. One of the documents was a March 21, 2001 letter from the California Secretary of State informing appellant that he could not use the name BioLink Information Systems as a business.

Siah testified that she did not authorize any of the withdrawals from the BioLink account. It was also stipulated that appellant was not a member of the California or Arizona bar.

Appellant defended on the theory that Siah and Pitchford contracted with him to buy and resell 300 gallons of Leinad to members of Pitchford's church. Appellant's son, Joshua Coffman, testified that he heard about the partnership deal and told appellant "to get a contract" and to "consult an attorney and try to make this more legit."

Appellant's girlfriend, Michele Inouye, stated that appellant was living in his car when they met, that she let him move in, and that she was vice-president of appellant's company, Biolink International. Appellant told her that he had obtained professional degrees on the Internet but there was some kind of mix up with tuition payments. Inouye used her credit card to pay for appellate's doctorate degree in naturopathy but canceled the payment after she learned that the degree was not going to be conferred.

Joinder of Misdemeanor Count

Appellant argues that the trial court erred in denying his motion to sever the misdemeanor count for false advertising.[2] (§ 954.) The motion to sever was brought the first day of trial. The prosecutor opposed the motion on the ground that it was untimely and should have been raised by demurrer. (See e.g., *People v. Jones* (1964) 228 Cal.App.2d 74, 90-91.) The prosecutor also argued that the false advertising count was connected to the grand theft. In 2000, appellant told Siah that he was an attorney and would help her invest the retirement savings. Two years later, appellant falsely advertised that he had professional degrees and was qualified to sell health services and products.

Joinder is proper when two or more offenses are "connected together in their commission," or are "different offenses of the same class or crimes or offenses." (§ 954.) If the offenses are of the same class of crime, the evidence supporting an offense need not be admissible as to the other offenses. (§ 954.1.) Offenses committed at different times and places against different victims are connected together in their commission where they are linked by a common element of substantial importance. (*People v. Mendoza* (2000) 24 Cal.4th 130, 160.)

Appellant committed the offenses by falsely stating that he had professional degrees and special training to advise people in their investments and health needs. The common link was BioLink, a sham business. Appellant gave seminars and falsely stated that he was an attorney, a doctor, and had a Ph.D. and other degrees.

The trial court found that count 5 for false advertising was cross-admissible to count 4 which alleged that appellant acted as an unlicensed investment advisor in 2000 and 2001. (Corp. Code, § 25230, subd. (a).) The trial court held that the "common plan

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[2] Count 5 alleged that appellant made false and misleading statements from April 1, 2003 through May 19, 2003, by overstating his professional credentials and disseminating health information "relating to the underlying cause of body problems and blood assessment services and health products" in violation of Business and Professions Code section 17500.

or design" was "the misrepresentation of one's professional licenses" and "I think there's a significant probative value." It did not abuse its discretion in concluding that the state's strong interest in the efficiency of a joint trial outweighed the potential for prejudice. (*People v. Arias* (1996) 13 Cal.4th 92, 126.)

We conclude that the offenses were properly joined and there was no prejudice. The jury was instructed that it was to "decide each Count separately. The defendant may be found guilty or not guilty of any or all of the crimes charged." (CALJIC 17.02.) The jury understood and followed the instruction as evidenced by the verdicts. It acquitted on count 4 for acting as an unlicensed investment advisor (Corp. Code, § 25230, subd. (a)) and returned guilty verdicts on the remaining counts for grand theft (count 1), money laundering (counts 2 and 3), and false advertising (count 4). Appellant makes no showing that the joinder "resulted in 'gross unfairness' amounting to a denial of due process. [Citation.]" (*People v. Arias*, *supra*, 13 Cal.4th at p. 127.)

Prosecutorial Misconduct

Appellant asserts that the prosecutor committed misconduct in commenting on appellant's failure to testify. (*Griffin v. California* (1965) 380 U.S. 609 [14 L.Ed.2d 106] (*Griffin*).) The prosecutor told the jury that defense counsel, "in opening statement, . . . stated that it was weird that Siah would give Margie [Pitchford] $5,000, but, yet, there is no uneasiness . . . that [Siah] would give . . . Mr. Coffman $47,000. But ladies and gentlemen, Exhibit 7 and 8, the books show that's exactly how the money was broken up. Even under Mr. Coffman's theory, there's a discussion that the $5,000 was going to go to her [Pitchford] . . . ."

Appellant objected, cited "*Griffin*," and said "I will explain later." The trial court instructed the jurors to rely on their own recollection of the evidence.

Appellant next objected to a slide in the prosecution's "Power Point" presentation which stated:

"Why is the defense attacking Claudette and Margie?

The defendant cannot tell the truth because he will disappoint Michelle Inouye [appellant's girlfriend] and his son."

The trial court instructed the jury that counsel's argument is not evidence and "the defendant in a criminal trial has a constitutional right not to be compelled to testify. You cannot draw any inference from the fact that a defendant does not testify."

Resuming final argument, the prosecutor stated: "I want to be very brief on this point and I just want to leave it to you, folks. Why is the defense attacking Claudette and Margie? And I suggest to you because you've got Michele and you've got John Coffman, and you have to imagine that they would just be extremely disappointed with Daniel Coffman if they knew what he had done. And I suggest to you that that's why you see the attacks on Claudette and Margie."

Appellant renewed the *Griffin* objection after the prosecutor finishing closing argument. The trial court overruled the objection, denied a motion for mistrial, and denied a subsequent motion for new trial. It did not err.

Although it is improper to comment on a defendant's failure to testify (*Griffin, supra,* 380 U.S. 609 [14 L.Ed.2d 106], a prosecutor may comment on the state of the evidence and defendant's failure to introduce material evidence or call logical witnesses. (*People v. Wash* (1993) 6 Cal.4th 215, 263; *People v. Morris* (1988) 46 Cal.3d 1, 35.)

Here the prosecutor commented on a weakness in appellant's theory of the case and the defense tactic of "attacking Claudette and Margie." The trial court correctly found that the prosecutor could argue that the defense was fabricated. A prosecutor "has the right to fully state his views as to what the evidence shows and to urge whatever conclusions he deems proper." (*People v. Lewis* (1990) 50 Cal.3d 262, 283.)

On review, we determine whether there is a reasonable likelihood that the prosecutor's comments could have been understood, within its context, to refer to defendant's failure to testify. (*People v. Clair* (1992) 2 Cal.4th 629, 663.) The comment about "Mr. Coffman's theory" of the case was not a reference to appellant's failure to testify. Nor was the comment that appellant's girlfriend and son would be disappointed if they knew what appellant had done. The argument that appellant could not tell his girlfriend and his son "the truth" referred to false statements made by appellant out of

court. The prosecutor made it clear that he was remarking on the general state of the evidence, not on appellant's failure to take the stand and testify. (See e.g., *People v. Morris, supra,* 46 Cal.3rd at p. 36.) It was not misconduct to comment on gaps or weaknesses in appellant's theory of the case, nor did the comments shift the burden of proof. **(***Ibid*.; see e.g., *People v. Frye* (1998) 18 Cal.4th 894, 972-973.)

Assuming, arguendo, that the comments were improper, the alleged error was harmless beyond a reasonable doubt. (*People v. Hardy* (1992) 2 Cal.4th 86, 173; *People v. Hovey* (1988) 44 Cal.3d 543, 572.) Evidence of appellant's guilt was overwhelming. The grand theft, money laundering, and false advertising offenses were proven beyond a reasonable doubt by the testimony of the victims, the bank records and canceled checks, appellant's flyers and business records, by appellant's resumes and loan application, and by appellant's statements at the BioLink seminars. "[I]n order for *Griffin* error to be prejudicial, the improper comment or instruction must either 'serve to fill an evidentiary gap in the prosecution's case,' or 'at least touch a live nerve in the defense, . . .' [Citations.] In the instant case, the errors complained of could not conceivably have served either function." (*People v. Vargas* (1973) 9 Cal.3d 470, 481.)

The jury was instructed that appellant was presumed innocent (CALJIC 2.90), that it may not draw any inference from appellant not testifying (CALJIC 2.60), and that the comments of counsel were not evidence. (CALJIC 1.02, 2.60) It is presumed that the jury understood and followed the instructions. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1234.) We reject the argument that the alleged misconduct, if any, rendered the trial fundamentally unfair or denied appellant due process. (*People v. Hill* (1998) 17 Cal.4th 800, 819; *People v. Samayoa* (1997) 15 Cal.4th 795, 841.)

Sentencing

Appellant claims that the trial court was biased and abused its discretion in not granting probation. After the verdict was entered, the sentencing hearing was continued at appellant's request. The trial court, over the prosecutor's objection, permitted appellant to remain free on his own recognizance.

At the August 18, 2005 sentencing hearing, the trial court was advised that appellant did not show for a probation department interview. Appellant claimed there was a misunderstanding. The trial court continued the sentencing hearing and, over the prosecutor's objection, permitted appellant to remain free on his own recognizance.

On September 20, 2005, appellant requested another continuance to argue a motion for new trial. The trial court granted a continuance but remanded appellant to custody based on the probation report. Before the hearing, appellant told the probation officer that transferring money to his personal account is something that people do "everyday," and that the money was his "so he should be able to transfer it 'all day long' if he feels like it." Appellant claimed that he was not guilty and that he should not serve jail time. The probation report stated that "defendant still refuses to accept responsibility for his behavior, he is not remorseful in the least, and he has the audacity to suggest that a 'tremendous amount of unfairness' has been heaped upon him."

The trial court was concerned about appellant's comments and "his sort of cavalier attitude toward the crimes he committed . . . . [H]is denial suggests that he is a danger to people who are subject to his -- his schemes."

Defense counsel argued that a remand would prevent appellant from making restitution. The trial court agreed that victim restitution was important, "[b]ut when Mr. Coffman tells probation that he's the victim, I have a huge problem with his continued OR after he's been convicted by the jury of the three felonies. [¶] So I'm not going to do it. He's going to be in custody. He's going to be earning credits."

On September 30, 2005, the trial court denied the motion for new trial and sentenced appellant to a three-year upper term for grand theft. On counts 2 and 3 for money laundering, it imposed and stayed eight-month concurrent terms (one third the midterm). (§ 654.) On count 5 for false advertising, appellant was sentenced to 24 days jail with credit for time served. The trial court ordered appellant to pay $87,247.57 victim restitution (§ 1202.4, subf. (f)) and other fines.

Appellant argues that the trial court was biased and committed sentencing errors but waived the issue by not objecting. (*People v. Scott* (1994) 9 Cal.4th 331, 353.)

Even if we assumed the errors were not waived, there was no abuse of discretion. The aggravated nature of the theft and appellant's lack of remorse supported the decision to deny probation and impose an upper term sentence. The probation report listed six factors to deny probation (Cal. Rules of Court, rule 4.414) and three aggravating sentence factors (Cal. Rules of Court, rule 4.421) which included: the planning, sophistication and professionalism in which appellant committed the crime; the abuse of a position of trust and confidence; the theft of a large sum of money causing the victim to suffer substantial monetary loss; appellant's lack of remorse; and that appellant would be a danger to other people's property if not imprisoned. "Lack of remorse is a valid aggravating factor where the defendant denied guilt and the evidence is overwhelming." (*People v. Holguin* (1989) 213 Cal.App.3d 1308, 1319; see also *People v. Leung* (1992) 5 Cal.App.4th 482, 507.)

The trial court considered all of the sentencing options including a suspended sentence and probation. Absent a showing that the sentence is irrational or arbitrary, it is presumed that the trial court acted to achieve legitimate sentencing objectives. (*People v. Superior Court* (*Du*) (1992) 5 Cal.App.4th 822, 831-832.) Probation is an act of leniency, not a matter of right. (*People v. Howard* (1997) 16 Cal.4th 1081, 1092.) The record amply supports the trial court's decision to deny probation and impose an upper three-year term for grand theft.

Blakely v. Washington

Appellant argues that the upper term sentence was based on sentencing factors not tried by a jury in violation of his Sixth Amendment right to jury trial. (*Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531].) Appellant did not object at the sentencing hearing and is precluded from arguing the issue on appeal. (*People v. Hill* (2005) 131 Cal.App.4th 1089, 1103.)

Waiver aside, there was no sentencing error. In *People v. Black* (2005) 35 Cal.4th 1238, our Supreme Court held that "the judicial factfinding that occurs when a judge exercises discretion to impose an upper term sentence or consecutive terms under California law does not implicate a defendant's Sixth Amendment right to a jury trial."

(*Id*., at p. 1244.) *People v. Black, supra,* controls. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Imposition of the upper term does not violate appellant's constitutional right to jury trial or due process.[3]

The judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

COFFEE, J.

[3] The United States Supreme Court has granted certiorari in *Cunningham v. California* (Feb. 21, 2006, No. 05-6551), ___ U.S. ___ [126 S.Ct. 1329] on the effect of *Blakely* and *United States v. Booker* (2005) 543 U.S. 220, on California's determinate sentencing law.

Glen M. Reiser, Judge

Superior Court County of Ventura

Jolene Larimore, under appointment by the Court of Appeal, for Defendant and Appellant.

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